No. 07-827

In the Supreme Court of the United States

DENNIS HASTY, FORMER WARDEN, PETITIONER

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS JOHN D. ASHCROFT AND ROBERT MUELLER

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STATEMENT

The decision of the United States Court of Appeals for the Second Circuit at issue in this petition is also the subject of a separate petition for a writ of certiorari filed on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, who, like petitioner Hasty in this case, were each defendants-appellants in the court of appeals. See *Ashcroft* v. *Iqbal*, petition for cert. pending, No. 07-1015 (filed Feb. 6, 2008).

The facts and procedural background of this case are summarized (at 2-8) in the petition in No. 07-1015.

ARGUMENT

1. The question presented by petitioner—the warden for the detention center where respondent Iqbal

was held during the period at issue—overlaps with the first question presented in No. 07-1015, concerning whether or in what circumstances conclusory allegations may state a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against supervisory officials with no direct involvement in alleged constitutional violations by others. As explained in the petition in No. 07-1015 (at 11-24), that question warrants this Court's review.

The Court may wish to consider that important question from the standpoint of high-ranking officials like the Attorney General and the Director of the FBI (*i.e.*, the petitioners in No. 07-1015) as well as the lower-level supervisors like the warden of a detention facility (*i.e.*, petitioner Hasty). At a minimum, however, the question warrants review with respect to claims that are directed against high-ranking officials like the Attorney General and the Director of the FBI, who could easily be added to *Bivens* complaints on the basis of a conclusory allegation that they "knew of or condoned" actions by others, which, in turn, could subject such high-ranking officials to the prospect of discovery, as petitioners Ashcroft and Mueller now face here, and thereby disrupt critical government operations—in conflict with this Court's precedents and the vital principles underlying the doctrine of qualified immunity. See Pet. at 21-24, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015).

Judge Cabranes underscored in his separate opinion the unique institutional concerns presented by allowing such claims to proceed on the basis of conclusory allegations against such high-ranking officials. See, *e.g.*, Pet. App. 214a-215a; see also *id.* at 188a (court of appeals opinion; contrasting "Hasty and the mid-level Defendants" with "Ashcroft and Mueller," whom it called "se-

nior officials of the Department of Justice"). As Judge Cabranes explained, "[e]ven with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 214a-215a. The amici former Attorneys General and FBI Directors have likewise demonstrated the added concerns and disruptive effects that the decision below threatens for high-ranking government officials. Barr Amicus Br. at 10-14, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015).

2. The petition in No. 07-1015 also presents an additional question—not presented by petitioner Hasty and implicating a clear circuit split—on whether actual knowledge, as opposed to constructive knowledge, of the actions of subordinates is necessary for the imposition of supervisory liability in a *Bivens* action. See Pet. at 25-33, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). As explained in the petition in No. 07-1015, that question is also of substantial importance and independently warrants certiorari. See also Barr Amicus Br. at 20-24, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). Indeed, by exposing supervisory officials to liability based on a constructive notice theory, the Second Circuit's decision in this case inappropriately expands the inferred *Bivens* cause of action to encompass something approaching *respondeat superior* liability, which this Court itself has rejected in the analogous context of Section 1983 actions. See Pet. at 28, 32, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). The combined effect of the Second Circuit's broad conception of

supervisory liability under *Bivens* and its lenient pleading standard poses a serious threat to the ability of high-ranking officials to carry out their duties and therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Court should, at a minimum, grant a writ of certiorari in No. 07-1015. If the Court wishes to consider the sufficiency of conclusory allegations against a broader range of governmental defendants, it should also grant a writ of certiorari in No. 07-827. Otherwise, the petition for certiorari in No. 07-827 should be held pending the disposition of No. 07-1015.

Respectfully submitted.

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